

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 35530

TODD ROBERT BRIGGS,)	2010 Unpublished Opinion No. 429
)	
Petitioner-Appellant,)	Filed: April 14, 2010
)	
v.)	Stephen W. Kenyon, Clerk
)	
STATE OF IDAHO,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Respondent.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Seventh Judicial District, State of Idaho, Bonneville County. Hon. Joel E. Tingey, District Judge.

Order of the district court summarily dismissing petition for post-conviction relief, affirmed.

Todd R. Briggs, Boise, pro se appellant.

Hon. Lawrence G. Wasden, Attorney General; Kenneth K. Jorgensen, Deputy Attorney General, Boise, for respondent.

GUTIERREZ, Judge

Todd Robert Briggs appeals from the district court's summary dismissal of his successive petition for post-conviction relief. We affirm.

I.

FACTS AND PROCEDURE

On May 28, 2002, Briggs pleaded guilty to one count of murder in the first degree, Idaho Code § 18-4003(a), and two counts of aggravated battery, I.C. §§ 18-903, 18-907(b). After being sentenced to a unified term of life imprisonment with twenty-five years determinate for the murder conviction and several lesser concurrent sentences for the battery convictions, he appealed the sentences as excessive. On May 15, 2003, this Court affirmed the sentences in an unpublished opinion. *State v. Briggs*, Docket No. 28867 (Ct. App. May 15, 2003). A remittitur issued on June 6, 2003.

Briggs filed a pro se petition for post-conviction relief on April 30, 2004, asserting several constitutional violations as well as multiple claims of ineffective assistance of counsel. The sole evidence submitted in support was an affidavit executed by Briggs on April 13, 2004. Counsel was subsequently appointed and on August 16, 2005, Briggs--through counsel--filed an amended petition for post-conviction relief asserting six instances of ineffective assistance of trial counsel. Again, the only evidence filed in support of the petition was an affidavit executed by Briggs on August 16, 2005. The state filed a motion for summary dismissal and after the parties agreed to forego argument on the motion, the district court issued a memorandum decision and order granting the motion on October 25, 2005, finding that Briggs had failed to state specifically how his counsel's performance was deficient or how the alleged deficient performance was prejudicial to him.

Briggs appealed the summary dismissal of his petition in regard to two grounds--that counsel was ineffective for failing to investigate and subpoena seven possible witnesses for the sentencing hearing and that counsel was ineffective for failing to investigate and present evidence on the effects of Briggs's alleged withdrawal from Zoloft (a prescription medication) at the time of the underlying crime. In an unpublished opinion, this Court affirmed the district court's summary dismissal, *Briggs v. State*, Docket No. 32502 (Ct. App. Feb. 28, 2007), holding that Briggs had failed to present evidence of what the testimony of the seven individuals would have been or how that testimony would have mitigated his sentence, and failed to present evidence of what facts would have been uncovered as a result of further investigation into Briggs's withdrawal from Zoloft or how those facts would affect a sentencing hearing. A remittitur issued on March 22, 2007.

Briggs filed a second pro se petition for post-conviction relief on December 10, 2007, asserting that his post-conviction counsel was ineffective for failing to prove that his trial counsel's ineffective assistance had prejudiced him, for failing to assert certain due process violations, for failing to assert that he had been denied his right to confront witnesses, and for failing to present oral argument on the state's motion for summary dismissal. In support, he filed an affidavit executed by him. The state filed a motion for summary dismissal, contending, among other things, that such a successive petition is not allowed and that Briggs failed to provide any evidentiary basis to support his claims. After a hearing, the district court granted the motion. Briggs now appeals.

II. ANALYSIS

Briggs contends that the district court erred in summarily dismissing his successive petition for post-conviction relief. All grounds for relief available to an applicant under the Uniform Post-Conviction Procedure Act must be raised in an applicant's original, supplemental, or amended application. I.C. § 19-4908. The language of Section 19-4908 prohibits successive applications in those cases where the applicant "knowingly, voluntarily and intelligently" waived the grounds for relief sought in the successive application or offers no "sufficient reason" for omitting those grounds in the original application. *Baker v. State*, 142 Idaho 411, 420, 128 P.3d 948, 957 (Ct. App. 2005) (citing *Palmer v. Dermitt*, 102 Idaho 591, 593, 635 P.2d 955, 957 (1981)). However, Section 19-4908 allows an applicant to raise a ground for relief, which was addressed in a former application, if he or she can demonstrate sufficient reason why that ground was inadequately raised or presented in the initial post-conviction action. *Baker*, 142 Idaho at 420, 128 P.3d at 957; *Hernandez v. State*, 133 Idaho 794, 798, 992 P.2d 789, 793 (Ct. App. 1999). A showing that a claim was not adequately presented in the first post-conviction action due to the ineffective assistance of prior post-conviction counsel provides sufficient reason for permitting issues that were inadequately presented to be presented in a subsequent application for post-conviction relief. *Id.* A petitioner has the burden of providing the district court with factual reasons upon which the court could conclude there was a "sufficient reason" why the grounds for relief asserted in his second petition were "not asserted or were inadequately raised in the original, supplemental or amended application." *Hooper v. State*, 127 Idaho 945, 948, 908 P.2d 1252, 1255 (Ct. App. 1995) (citing I.C. § 19-4908).

On appeal, Briggs contends that post-conviction counsel inadequately presented his contentions of ineffective assistance of his trial counsel in his first post-conviction petition. Specifically, he contends that his post-conviction counsel failed to comply with the second *Strickland* prong¹ to show prejudice stemming from trial counsel's alleged ineffectiveness where

¹ To prevail on an ineffective assistance of counsel claim, the defendant must show that the attorney's performance was deficient and that the defendant was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Hassett v. State*, 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct. App. 1995). Where, as here, the defendant was convicted upon a guilty plea, to satisfy the prejudice element, the claimant must show that there is a reasonable

trial counsel was operating under an alleged conflict of interest and was not death-penalty certified, where trial counsel did not utilize court-allocated funds to investigate possible defenses including the possibility that Briggs's withdrawal from Zoloft may have been the source of his violent behavior, and where trial counsel did not "confront" several sentencing hearing witnesses.

In *Wolfe v. State*, 113 Idaho 337, 743 P.2d 990 (Ct. App. 1987), this Court noted that in examining a successive petition, while I.C. § 19-4908 permits an inquiry into why the applicant's attorney on the first application did not fully present his client's grounds for relief, the ultimate focus of the proceeding would remain on whether the second application has raised not merely a question of counsel's performance but *substantive grounds for relief* from the conviction and sentence. *Id.* at 339, 743 P.2d at 992 (emphasis added). Thus, adopting the approach followed in *Wolfe*, we examine the claims raised by Briggs to determine whether he has set forth any "ground for relief . . . which for sufficient reason was not asserted or was inadequately raised in the original . . . application." I.C. § 19-4908. *See also Nguyen v. State*, 126 Idaho 494, 887 P.2d 39 (Ct. App. 1994).

An application for post-conviction relief initiates a proceeding that is civil in nature. *State v. Bearshield*, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983); *Clark v. State*, 92 Idaho 827, 830, 452 P.2d 54, 57 (1969); *Murray v. State*, 121 Idaho 918, 921, 828 P.2d 1323, 1326 (Ct. App. 1992). Like a plaintiff in a civil action, the applicant must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based. I.C. § 19-4907; *Russell v. State*, 118 Idaho 65, 67, 794 P.2d 654, 656 (Ct. App. 1990). An application for post-conviction relief differs from a complaint in an ordinary civil action. An application must contain much more than "a short and plain statement of the claim" that would suffice for a complaint under I.R.C.P. 8(a)(1). Rather, an application for post-conviction relief must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached, or the application must state why such supporting evidence is not included with the application. I.C. § 19-4903. In

probability that, but for counsel's errors, he or she would not have pled guilty and would have insisted on going to trial. *Plant v. State*, 143 Idaho 758, 762, 152 P.3d 629, 633 (Ct. App. 2006).

other words, the application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal.

Idaho Code Section 19-4906 authorizes summary disposition of an application for post-conviction relief, either pursuant to motion of a party or upon the court's own initiative. Summary dismissal of an application pursuant to I.C. § 19-4906 is the procedural equivalent of summary judgment under I.R.C.P. 56. Summary dismissal is permissible only when the applicant's evidence has raised no genuine issue of material fact which, if resolved in the applicant's favor, would entitle the applicant to the requested relief. If such a factual issue is presented, an evidentiary hearing must be conducted. *Gonzales v. State*, 120 Idaho 759, 763, 819 P.2d 1159, 1163 (Ct. App. 1991); *Hoover v. State*, 114 Idaho 145, 146, 754 P.2d 458, 459 (Ct. App. 1988); *Ramirez v. State*, 113 Idaho 87, 89, 741 P.2d 374, 376 (Ct. App. 1987). Summary dismissal of an application for post-conviction relief may be appropriate, however, even where the state does not controvert the applicant's evidence because the court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law. *Roman v. State*, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994); *Baruth v. Gardner*, 110 Idaho 156, 159, 715 P.2d 369, 372 (Ct. App. 1986).

On review of a dismissal of a post-conviction relief application without an evidentiary hearing, we determine whether a genuine issue of fact exists based on the pleadings, depositions, and admissions together with any affidavits on file. *Ricca v. State*, 124 Idaho 894, 896, 865 P.2d 985, 987 (Ct. App. 1993). In post-conviction actions, the district court, as the trier of fact, is not constrained to draw inferences in favor of the party opposing the motion for summary disposition; rather the district court is free to arrive at the most probable inferences to be drawn from uncontroverted evidence. *Hayes v. State*, 146 Idaho 353, 355, 195 P.3d 712, 714 (Ct. App. 2008). It is also the rule that a conclusory allegation, unsubstantiated by any fact, is insufficient to entitle a petitioner to an evidentiary hearing. *Smith v. State*, 94 Idaho 469, 473, 491 P.2d 733, 737 (1971) (overruled on other grounds); *Nguyen*, 126 Idaho at 497, 887 P.2d at 42; *King v. State*, 114 Idaho 442, 446, 757 P.2d 705, 709 (Ct. App. 1988); *Drapeau v. State*, 103 Idaho 612, 615, 651 P.2d 546, 549 (Ct. App. 1982). Idaho Code § 19-4903 states that "[a]ffidavits, records, or other evidence supporting its allegations shall be attached to the application or the application shall recite why they are not attached."

Here, a review of Briggs's successive petition reveals that he did not present sufficient evidence of any facts beyond what was asserted by his initial post-conviction counsel in regard to his allegations of ineffective assistance of trial counsel. His successive petition and affidavit in support merely state (in various ways) his contention that post-conviction counsel failed to show prejudice in regard to his ineffective assistance of trial counsel claims. He failed to cite to authority for his proposition that he should be allowed to file a successive petition due to his post-conviction counsel's inadequacy. In his response to the state's motion for summary dismissal,² Briggs attached several pages of the "Petitioner's Response and Opposition to Motion for Summary Dismissal" filed by his initial post-conviction counsel in response to the state's motion for summary dismissal of his initial post-conviction petition. Presumably as his argument to avoid summary dismissal of his successive petition, Briggs made handwritten notations on the excerpted pages, emphasizing and attempting to elucidate some points. Finally, in his response he stated:

For the foregoing reasons [presumably in reference to the excerpted response], and for the potential, in all likelihood, for discovering more evidence in his favor by way of testimony from expert witnesses regarding the effects of the Zolof withdrawal, more witnesses regarding Mr. Briggs' bizarre behavior the week of 10/21-10/28 2001 [sic] (including Dori Lott, TSI employees, Camilla Vanderlinden, Bowlero employees, Garcias [sic] personnel, Jackson's employees and video, Deralee Beck, Jared, Mays, Ameritel Inn clerk, Texas Rhodehouse [sic] bartender, the dentist, and others), the list of evidence found in petitioner's car, new evidence showing a history of depression dating back to at least 1999 with accompanying medical records, hearsay of Deana Higgins/B. Park, new PSI evidence re: Toni Castaneda, and overall what the investigation would have revealed in mitigating evidence to impact the sentencing, if not to have made a trial initially possible--that this matter proceed to evidentiary hearing [sic].

Assessing the entirety of Briggs's successive application and supporting affidavit, and taking into account his response to the state's motion to dismiss, he has failed to allege facts,

² This response was filed pro se, because, Briggs claims in the document, he presumed that he was without counsel due to a potential conflict of interest resulting in the "voluntary dismissal" of both attorneys appointed to represent Briggs in regard to his successive petition. Subsequent to the filing of this response, Briggs apparently moved to dismiss his court-appointed counsel, a motion the district court denied. While counsel then proceeded to represent Briggs at the summary dismissal hearing on his successive petition, there is nothing in the record indicating that counsel filed any substantive documents on Briggs's behalf in regard to his successive petition.

which, if true would entitle him to relief.³ Initially, we note that his successive petition and accompanying affidavit merely included statements of the issues without including any facts allowing the district court to conclude (1) that there was sufficient reason why his claims had been inadequately pursued initially, and (2) that there was a basis for post-conviction relief. And, as we noted above, bare or conclusory allegations, unsubstantiated by any fact, are inadequate to entitle an applicant to an evidentiary hearing. *Nguyen*, 126 Idaho at 497, 887 P.2d at 42; *King*, 114 Idaho 442, 757 P.2d 705. *See also* I.C. § 19-4903 (noting that an application for post-conviction relief must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached, or the application must state why such supporting evidence is not included with the application).

In addition, Briggs's response to the state's summary dismissal motion failed to assert the necessary bases for the district court to find in Briggs's favor on the two issues above. In fact, reasserting what was advanced by his initial post-conviction counsel belies his claim that there was sufficient reason--namely his post-conviction counsel's inadequate performance--that he did not raise the claims he now asserts in a successive petition. In addition, simply asserting the *possibility* of mitigating evidence being discovered, and listing potential witnesses, is not sufficient to entitle him to an evidentiary hearing--such assertions are bare and conclusory and included no affidavits or other evidence showing the actual existence of mitigating evidence that could have been discovered and presented by Briggs's defense counsel. In short, Briggs has presented nothing but speculation. *See Drapeau*, 103 Idaho at 617, 651 P.2d at 551 (noting that allegations asserted in a petition for post-conviction relief, without supporting affidavits based upon otherwise verifiable information, cannot be a basis for post-conviction relief). *See also Hooper*, 127 Idaho 945, 908 P.2d 1252 (holding that in his successive post-conviction petition, petitioner failed to assert any basis on which the district court could conclude that there was sufficient reason why the grounds for relief asserted in his second petition had not been raised--or were inadequately raised--in his initial petition); *Nguyen*, 126 Idaho at 497, 887 P.2d at 42

³ In his brief to this Court, Briggs alleges additional facts and possible prejudice that he contends stemmed from his trial counsel's ineffective assistance of counsel. However, on appeal we review whether the successive petition, as filed with the district court, was sufficient to survive summary dismissal. Thus, contentions contained only in Briggs's appellate brief are irrelevant to our inquiry.

(affirming summary dismissal of a successive application where it contained only allegations, without supporting affidavits based on otherwise verifiable information, and thus contained no evidence regarding the merits of his underlying claims or that his counsel was ineffective for failing to raise the issues in the first post-conviction proceeding); *King*, 114 Idaho 442, 757 P.2d 705 (affirming summary dismissal of successive petition where there were no affidavits, records or other evidence offered in support of the petition other than an affidavit by King outlining the factual circumstances of the underlying crime and his dissatisfaction because of the lesser penalties meted out to co-defendants on the charge, as well as because of King's failure to provide a sufficient reason why the grounds alleged in the successive application were not raised in the first application). *Compare Stuart v. State*, 127 Idaho 806, 907 P.2d 783 (1995) (holding that successive petition set forth facts, with accompanying affidavits, alleging newly discovered information not known to the applicant at the time of the filing of his first petition).⁴

In sum, because Briggs did not present evidence of facts showing that there was sufficient reason his claims were inadequately presented in his first post-conviction petition or that there were substantive grounds for relief in regard to his claims of ineffective assistance of trial counsel, we affirm the district court's summary dismissal of Briggs's successive petition for post-conviction relief.

Chief Judge LANSING and Judge MELANSON **CONCUR.**

⁴ We also note, as the district court in this case pointed out, the mere fact that the district court which adjudicated Briggs's first petition found there was no prejudice shown does not conclusively establish that counsel's performance was defective such that Briggs should have the opportunity to file a successive petition. Just as likely, as the first district court concluded, is that Briggs had not established prejudice not because post-conviction counsel was ineffective, but because there were, in fact, no facts establishing prejudice stemming from trial counsel's alleged defective representation.